

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

October 24, 2007

No. 07-50241
Conference Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ROSARIO MUNIZ TELLEZ

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:06-CR-158-ALL

Before JOLLY, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:*

Rosario Muniz Tellez appeals his conviction following a jury trial for being an unlawful user of a controlled substance in possession of ammunition in violation of 18 U.S.C. § 922(g)(3). He argues that the district court erred in denying his request for an instruction and jury charge that included the definition of "unlawful user" that this court used in *United States v. Herrera*, 289 F.3d 311, 323-24 (*Herrera I*), vacated, *United States v. Herrera*, 313 F.3d 882 (5th Cir. 2002) (en banc) (*Herrera II*). The Government moves for summary

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

affirmance on the ground that Muniz Tellez's argument is foreclosed by our precedent or, in the alternative, for an extension of time to file an appellate brief.

We review a district court's refusal to give a requested jury instruction for abuse of discretion. *United States v. Cain*, 440 F.3d 672, 674 (5th Cir. 2006). Muniz Tellez's argument that the district court erred in refusing to give the jury a *Herrera I* instruction is foreclosed by our precedent, particularly our decision in *United States v. Patterson*, 431 F.3d 832, 837-39 (5th Cir. 2005), cert. denied, 126 S. Ct. 2043 (2006). See also *United States v. McCowan*, 469 F.3d 386, 391-92 (5th Cir. 2006); *Herrera II*, 313 F.3d at 883-85. Accordingly, the district court's judgment is **AFFIRMED**, the Government's motion for summary affirmance is **GRANTED**, and the Government's alternative motion for an extension of time to file an appellate brief is **DENIED**.